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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 908 J

VOORHIES STELLY,

Petitioner,

versus

BAUER DREDGING COMPANY, INC.,

Respondent.

(Sub nom. Voorhies Stelly v. Employers National Insurance Company and Bauer Dredging Company, Inc.)

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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TO THE HONORABLES, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Voorhies Stelly respectfully petitions the Court to review by certiorari the decision of the United States Court of Appeals for the Fifth Circuit, rendered August 25, 1970, *sub nom., Voorhies Stelly, Plaintiff-Appellant v. Employers National Insurance Company and Bauer Dredging Company, Inc.*, No. 28,847.

OPINIONS BELOW

The order of the District Court, unreported, quashing summons and purportedly transferring the case to another district is Appendix "A" at page 24.

The judgment of the Court of Appeals, yet unreported, dismissing the appeal on the Court's own motion for lack of jurisdiction is Appendix "B" at pages 25-26.

The order of the Court of Appeals ordering the appeal reinstated for further argument and briefing is Appendix "C" at page 27.

The decision of the Court of Appeals denying rehearing is Appendix "D" at pages 28-33.

This Court's jurisdiction is invoked under the provision of 28 U.S.C.A., §1254 (1).

THE QUESTION PRESENTED

Is the following order final under the particular circumstances:

A seaman files a Jones Act suit where both he and his employer reside in Louisiana. His employer moves to quash summons on the ground that the accident happened outside Louisiana and that under Louisiana state law no courts in Louisiana have either procedural or substantive jurisdiction over cases involving torts committed in other states by his employer because his employer is a foreign corporation, chartered in an-

other state, though admittedly residing in Louisiana, licensed to do business there and doing a large amount daily.

No request nor motion for a change of venue on any grounds is made by anyone for any reason. No *alias* process is allowed.

An order is entered quashing summons but transferring, *sua sponte*, the case to the district where the corporate employer is chartered.

From this the seaman takes an ordinary appeal which is dismissed on the ground that the order is not final.

Question: Is the order final under these circumstances so as to support an appeal?

STATUTORY PROVISIONS INVOLVED

The act bestowing appellate jurisdiction 28 U.S.C.A., §1291 so far as it provides:

> "The courts of appeals shall have jurisdiction of appeals from all final decisions of the District Courts of the United States. . . ."

The Jones Act, for the protection and relief of seamen, 46 U.S.C., §688, so far as it pertains to venue:

> ". . . and in such action all statutes of the United States modifying or extending the common

> law right or remedy in cases of personal injury to railway employees shall apply; .... Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located." 46 U.S.C.A., §688. Mar. 4, 1915 c.153, §20, 38 Stat. 1185; June 5, 1920, c.250, §33, 41 Stat. 1007.

The FELA, 45 U.S.C., §56, an act pertaining to the liability of railways for negligent injury to their employees so far as venue is concerned:

> "Under this chapter an action may be brought in a District Court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the Courts of the United States under this chapter shall be concurrent with that of the courts of the several states." 45 U.S.C.A., §56, April 5, 1910, c.141, §1, 36 Stat. 291.

The act pertaining to corporate venue, 28 U.S.C., §1391 (c):

> "A corporation may be sued in any judicial district in which it is incorporated or licensed to do business or is doing business, and such judicial districts shall be regarded as the residence of such corporation for venue purposes." June 25, 1948, c.646, 62 Stat. 935.

The statute providing for transfer if a case if filed in the wrong division or district, 28 U.S.C., 1406(a):

> "The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice transfer such case to any district or division in which it could have been brought."

Rule 4(d) (3) of the Federal Rules of Civil Procedure providing for summoning foreign corporations:

> "... by delivering of a copy of the summons and of the complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process ...."

REASONS RELIED ON FOR SEEKING THE WRIT

THE SIGNIFICANCE OF THE PETITION LIES IN THE DESIRABILITY OF A PROPER BLEND OF CERTAINTY, ECONOMY AND PRACTICALITY IN DETERMINING AN APPEALABLE DECISION, ESPECIALLY IN A CASE INVOLVING A FEDERAL QUESTION RAISED BY AN EMPLOYERS LIABILITY ACT.

CONFLICT WITH THIS COURT

The decision that the order was not appealable creates conflict in general and also confusion in the

special case of the Jones Act and the FELA. It conflicts directly with this Court's ruling in *Rosenberg Bros. v. Curtis Brown Co.*, 260 U.S. 516; an by Analogy *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541; *Gillespie v. United States Steel Corp.*, 379 U.S. 148; *Swift & Co., Packers v. Companie Colombienna del Cariebe, S.A.*, 339 U.S. 684; *U.S. v. Wallace & Tiernan Co., Inc.*, 336 U.S. 793; and inferentially with *City of Waco v. United States Fidelity & Guaranty Co.*, 293 U.S. 140.

OTHER CIRCUITS

It also conflicts directly with other circuits. *Cook v. Bostitch, Inc.*, 2nd Cir., 328 F.2d 1 (1964); *Butler v. Ungerleider*, 2nd Cir., 187 F.2d 238 (1951); *Zuckerman v. McCulley*, 8th Cir., 170 F.2d 1015 (1948); *Moss v. Kansas City Life Ins. Co.*, 8th Cir., 96 F.2d 108 (1938); *Wisconsin Mutual Ins. Co. v. Western Mutual Fire Ins. Co.*, 7th Cir., 107 F.2d 402 (1939); *In Re Melekof*, 9th Cir., 114 F.2d 727 (1940); *Zimmers v. Dodge Bros., Inc.*, 21 F.2d 152 (D.C., N.D., Ill., E.D., 1927); *Fern v. U.S.*, 213 F.2d 674, 15 Ala. 31 (1954); *Rogers v. Watson*, 46 F.2d 753 (C.C.A., Ind., 1931) cert. denied 283 U.S. 852; *E. I. Dupont de Nemours & Co. v. Byrnes*, 101 F.2d 14, 2nd Cir. 1939.

CONFLICT WITHIN THE JURISDICTION

The decision conflicts inferentially with decisions of the same Circuit. *Kelly v. Greer*, 5th Cir., 354 F.2d 209 (1965): "We hold that the order constitutes a 'final decision' within the meaning of 28 U.S.C., §1291, and

is therefore appealable. The order (quashing a writ of assistance) is somewhat analogous to an order granting a motion to quash service, which has been held to be final and appealable in numerous cases. (Citations) Furthermore, the Supreme Court has recently stated that a 'final decision' within the meaning of §1291 'does not necessarily mean the last order possible to be made in a case', and that the requirement of finality is to be given a 'practical rather than a technical construction', *Gillespie v. United States Steel Corp.*, 1964, 379 U.S. 148, 85 S.Ct. 308, 13 L.Ed. 2d 199."

THE DECISION THAT A NON-DISCRETIONARY VENUE TRANSFER UNDER 28 U.S.C.A. 1406(a) KEPT THE LOWER COURT'S ORDER FROM BEING FINAL IS IN CONFLICT WITH THE DECISIONS OF THIS COURT AND OTHER CIRCUITS

A venue transfer under §1406(a) is authorized only where the Court is either without jurisdiction or venue. In this case these issues present purely a point of law. Where venue and jurisdiction are patently proper and admitted by defendant's own response, the Trial Court has no discretion to transfer the case under this section. Since the face of defendant's own paper affirmatively shows proper venue and jurisdiction, it was not within the discretion of the Trial Court to transfer the case. Thus the Appellate Court's decision that the transfer of the case kept the order from being final is in conflict directly, by analogy, and inferentially with decisions of this Court and appellate courts to the effect that even though an order of

dismissal for lack of venue is without prejudice to filing another suit, such an order is final. *U.S. v. Wallace & Tiernan Co.*, 336 U.S. 793; *U.S. v. Shelly*, C.A.N.Y., 1954, 218 F.2d 157; *Butler v. Ungerleider*, 2nd Cir., 187 F.2d 238; *Lopinsky v. Hertz Drive-UR-Self Systems*, 2nd Cir., 194 F.2d 422; *Jiffy Lubricator Co. v. Steward-Warner Corp.*, 4th Cir., 177 F.2d 360, cert. denied 338 U.S. 947; and that a judgment of dismissal of a complaint for lack of jurisdiction dependent upon diversity is final. *Rogers v. Watson*, C.C.A. Ind., 1931, 46 F.2d 753, cert. denied 283 U.S. 852; and in conflict with cases holding that a non-suit is appealable though not an adjudication of the merits. *Connecticut Fire Ins. Co. v. Manning*, 1910, 177 F. 893, 101 C.C.A. 107; *Cybur Lumber Co. v. Erkhart*, Miss. 1918, 247 F. 284, 159 C.C.A. 378.

THE TRIAL COURT'S IMPLIED FINDING THAT STATE LAW CONTROLS THE POINTS OF SUBSTANTIVE AND PROCEDURAL JURISDICTION AS WELL AS VENUE IN A CASE UNDER THE JONES ACT IS IN CONFLICT WITH THE DECISIONS OF THIS COURT AND OF OTHER CIRCUITS

Federal Law controls points of such nature. *Petty v. Tennessee-Missouri Bridge Commission*, 359 U.S. 275; *Dice v. Akron C. & Y. R.R. Co.*, 342 U.S. 359; *Parden v. Terminal R.R. of Alabama State Docks Department*, 377 U.S. 184; *Burnett v. N.Y. Central R.R. Co.*, 380 U.S. 424; *Bridger v. Union R.R. Co.*, 355 F.2d 382 (6th Cir., 1966); *Woods v. Interstate Realty Co.*, 337 U.S. 535; *Guaranty Trust Co. of N.Y. v. York*, 326

U.S. 99; *Kellaem v. Maryland Casualty Co.*, 312 U.S. 377; *Barrow Steamship Co. v. Kane*, 42 L.Ed. 964; *Akin v. Louisiana National Bank of Baton Rouge*, 5th Cir. 322 F.2d 749 (1963); *St. John v. State Farm Mutual Automobile Ins. Co.*, 225 F.Supp. 74 (D.C.Mo. 1964); *Hartley v. Sioux City & New Orleans Barge Lines, Inc.*, 3rd Cir. 379 F.2d 354 (1967); see, *Lone Star Package Car Co. v. Baltimore & Ohio R.R. Co.*, 5th Cir., 212 F.2d 147 (1954); *Connolly v. Farrell Lines, Inc.*, 1st Cir. 268 F.2d 653, (1959) cert. denied 80 S.Ct. 208, 361 U.S. 902, 4 L.Ed.2d 158.

STATEMENT OF THE CASE

Stelly, a seaman, got hurt on the job on a river in Arkansas. He went back home to Louisiana[1] and filed a Jones Act suit against his employer, Bauer Dredging Company, Incorporated.[2] Bauer also resides where he filed suit[3] because Bauer in its own words "is licensed to do and is doing business within the State of Louisiana and its agent for service of process is Ben Taylor, Jr., Louisiana National Bank Building, Baton Rouge, Louisiana".[4] Bauer was summoned to answer by service on Taylor its agent for process,[5] admittedly good as to form. The sole ground assigned for quashing was that the accident happened in another state. Without

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[1]Where it was stipulated below that he resides.

[2]And also its insurer, Employers National Insurance Company, who was dismissed from the case as not subject to direct action; its dismissal is final.

[3]In the Western District of Louisiana.

[4]R.p.9, Bauer's affidavit in support of a motion to quash summons. Appendix "F", p. 36

[5]R.p. 8-12.

assignment of written reasons, the Court quashed summons and transferred the case to the district where Bauer was incorporated.[6] As a precaution counsel asked the Court to certify the order so that if it were not final interlocutory appeal could be sought.[7]

Concerned that the Court of Appeals might not accept the certification, counsel researched the point and came to the conclusion that the order was a final decision that could be appealed. After both sides had lodged briefs on the issues whether it was error to quash summons and transfer, and the case had been set down for hearing, the Court of Appeals on its own motion dismissed on the ground that the order was not a final decision.[8] Plaintiff immediately petitioned for rehearing as the point had never been raised nor briefed before. The Court in effect recalled the order and restored the case to its calendar date.[9] At argument this jurisdictional point was carried with the merits, so to speak, and the Court ordered that the jurisdictional point be briefed again by both sides. After submission of second briefs the Court reaffirmed its dismissal by written opinion.[10] The Appellate Court's rationale

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[6]R.p. 31-32; Appendix "A", p. 24

[7]R.p. 32. Stelly also filed a "motion for new trial," actually a 62(b) motion on the ground that state law had changed, should it be held applicable, between first and second summons which now sanctioned such suits under state law. This was denied on the ground that his appeal notice deprived the trial court of jurisdiction Appendix E, p. 34. Notice of appeal was also taken from this ruling. R.p. 36.

[8]Appendix B p. 25-26.

[9]Appendix C p. 27.

[10]Appendix D pp. 28-33

seems to be that the transfer kept the order quashing summons from being a final decision, appealable as a matter of right, because Stelly ran no risk of bar by limitations.

As memoranda it is noted that no one asked for transfer on any grounds; no note of evidence formal or informal was made thereon; Bauer was the sole defendant left in the case when Stelly took his appeal; and he was afforded no *alias* process (implying that none would be any good for lack of substantive jurisdiction.)

ARGUMENT

As intimated by the affidavits in support of the motion to quash,[11] Bauer's grounds therefor were that the accident happened outside of Louisiana and that under Louisiana state law a foreign corporation though qualified and doing business in Louisiana with an agent appointed for service of process could not be sued in Louisiana on a tort occurring in a foreign jurisdiction. Geographically stated, if the accident had happened in navigable waters one foot inside Louisiana jurisdiction and venue would be proper and sufficient for the suit to lie in the court where it was filed. By necessary implication the Trial Court agreed and entered the order quashing and transferring because of this purported state law that it had neither substantive nor procedural jurisdiction and thus it was empowered to quash summons and transfer the case under 28

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[11]R.pp. 8-12

U.S.C.A. §1406(a) to the district where Bauer was incorporated.

In reply to this Stelly's contentions are essentially that his suit under the Jones Act presents a federal question and is thus not controlled by state law purportedly to the foregoing effect;[11A] that under the jurisdictional and venue provisions of the Jones Act incorporated from the FELA he was entitled to sue Bauer where it resided; that under 28 U.S.C.A. §1391 (c) providing that a corporation resides in any district where it is licensed to do or is doing business, Bauer was subject to this Jones Act suit in Louisiana; that the service of process on the duly authorized agent, Taylor, was patently proper under F.R.C.P. 4(d) (3) providing for summoning of foreign corporations through service upon its agent authorized by appointment or the law to receive service of process; and that if for any conceivable reason service was bad he was entitled to alias process since the Court had substantive jurisdiction and venue was well laid: that this being so, the Court had no discretion to transfer the case under §1406(a) and thus the order was final and appealable.[12]

It is too settled for citation that where a case is brought under an act of Congress in the nature of the Jones Act, a federal question is presented controlled

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[11A]As an alternative argument below Stelly contended that such was not now and never had been the state law, anyhow.

[12]Bauer's business in Louisiana is of such large nature that procedural jurisdiction could be obtained in several ways under rule 4. It has "yellow-page" presence in the New Orleans phone book.

by federal law.[13] This rule has been followed by the Court of Appeals below.[14] This extends to questions of procedure of the nature here.[15] As stated in a similar case:[16]

> "Comparatively recent decisions have held that federal courts considering questions arising under the Constitution of the United States or federal statutes properly may exercise jurisdiction limited only by the due process clause of the Fifth Amendment. Even where the procedure for exercising that jurisdiction is prescribed by state law, these courts need not be bound by restrictions found in the state law."

Similarly it is horn book that seamen under the Jones Act have every right and benefit of jurisdiction and venue bestowed upon railway workers by the FELA; that its venue and jurisdictional provisions are incorporated in the Jones Act is proven by a decision of the Fifth Circuit itself holding that Jones Act cases cannot be removed because FELA cases cannot.[17] Under the FELA and thus the Jones Act a seaman may sue his corporate employer anywhere it resides,[18] and Bauer resides in Louisiana under the corporate venue act.[19]

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[13] *Parden v. Terminal R.R. of Ala. State Docks Dept.*, 377 U.S. 184.
[14] *Lone Star Package Car Co. v. Baltimore & Ohio R.R. Co.*, 5th Cir., 212 F.2d 147 (1954).
[15] *Parden v. Terminal R.R. of Ala. State Dry Docks*, 377 U.S. 184.
[16] *Hartley v. Sioux City & New Orleans Barge Lines, Inc.*, 3rd Cir. 379 F.2d 354 (1967) at p.356.
[17] *Pate v. Standard Dredging Corp.*, 5th Cir., 193 F.2d 498 (1952).
[18] 45 U.S.C.A. §56; 46 U.S.C.A. §688.
[19] 28 U.S.C.A. §1391(c).

Thus the Trial Court had no discretion to transfer the case on jurisdictional grounds. There is no note of evidence showing a close case of presence, residence, or doing business. Bauer got summons quashed on its sworn word to the contrary. Surely it is thus estopped from now saying that this is a case of doubtful jurisdiction or venue. It is elementary public policy that one cannot urge grounds destructive of his own sworn word upon which he seeks relief.

The Court of Appeals based its decision that the order was not final upon cases holding that *discretionary* rulings under §1404(a) allowing transfer for inconvenient forum have been held not to be final; but the very reason assigned is that such rulings are discretionary and thus interlocutory and cannot be reviewed save by extraordinary writ for gross abuse of discretion. Again, here discretion has no room for play. This is the distinction that makes the difference. The Court of Appeals held that the order quashing was not final because Stelly could still prosecute his suit in another jurisdiction and so interpreted this Court's decisions holding such an order final. But this reasoning destroys the substantial if not the substantive benefits of choice of jurisdiction and venue bestowed by the federal employers liability acts. In the decision of *Rosenberg Bros. v. Curtis Brown Co.*[20] and in kindred cases, this Court has held that an order quashing summons on jurisdictional grounds (and not merely for defects in mechanics that could be cured by alias summons) is an appealable order; the decisions have never dis-

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[20]260 U.S. 516.

cussed, much less made a distinction between cases where the order would put the plaintiff out of any court forever and those where he could come again. Since the transfer provisions of §1406(a) are simply, as it were, a substitute for dismissal and refiling the Court of Appeals' decision conflicts with such cases as *U.S. v. Wallace and Tiernan Co.*,[21] that although an order of dismissal for lack of venue is without prejudice to filing another suit such an order is still final; and decisions that a judgment of dismissal of a complaint for lack of jurisdiction dependent upon diversity are final;[22] and cases holding that a non-suit is appealable although not an adjudication of the merits.[23]

Stelly, under legislation repeatedly held to be construed most liberally in favor of those whom its remedial effect seeks to give relief, could file where he did as a matter of right; thus the order transferring generates the analogy that an order denying a motion to intervene as a matter of right is final.[24]

In *Rosenberg*, supra, there was no indication by this Court that its holding turned upon whether the plaintiff would be barred by time if the order stood or there was not another court in which he might seek relief.

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[21] 336 U.S. 793.

[22] *Rogers v. Watson*, C.C.A. Ind., 1931, 46 F.2d 753, cert. denied 283 U.S. 852.

[23] *Connecticut Fire Ins. Co. v. Manning*, 1910, 177 F.2d 893, 101 C.C.A. 107; *Cybur Lumber Co. v. Erkhart*, Miss., 1916, 247 F. 284, 159 C.C.A. 378.

[24] *Sutphen Estates, Inc. v. U.S.*, 342 U.S. 19; *Brotherhood of R.R. Trainmen v. Baltimore and Ohio R.R. Co.*, 331 U.S. 519, 524; *Burger Chef Systems, Inc. v. Burger Chef of Mich., Inc.*, 6th Cir., 334 F.2d 926 (1964).

The Appellate Court reads this into *Rosenburg* by its analysis of *In Re Melekof*.[25] The Fifth Circuit rationalized that the Ninth Circuit found the order quashing service there final on the stated ground that "no valid service could be made elsewhere". The case will not bear such a literal interpretation: Valid service could not be made elsewhere so long as it was issued out of the court where the suit lay; but this is far from an implied rationale that the order was final because it was literally impossible for the suit to be refiled where valid service could be obtained.

Thus the rationale of the Fifth Circuit generates an additional requirement, not intended by this Court, for an order quashing service to be final.

This is conclusively proven by this Court's decision of *Wecker v. National Enameling & Stamping Co.*,[26] virtually an acid test: Plaintiff's suit was removed; his motion for remand was denied; but plaintiff chose to stand on his motion and suffered dismissal, upon motion of defendant, for refusal to prosecute. This Court held the dismissal to be final and *whether it was a bar, to be immaterial:*

> "Whether this judgment would be a bar to another action is not now before us; it is final, so far as the case is concerned, and terminated the action."

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[25] 9th Cir., 114 F.2d 729 (1940).
[26] 204 U.S. 176.

So in *U.S. v. Shelly*,[27] the Court held: "An order of dismissal for lack of venue, contrary to the assertion of the government, is final and appealable. 'That the dismissal was without prejudice to filing another suit does not make the cause unappealable, for denial of relief and dismissal of the case ended this suit *so far as the district court was concerned. U.S. v. Wallace and Tiernan Co.*, 336 U.S. 793.'" (Emphasis added.)

Bauer's reliance below upon such cases as *Goldlawr, Inc. v. Heiman*[28] and *Dubin v. U.S.*,[29] is misplaced since these cases are simply not on point: In them the defendant complains of a transfer to a venue where the case would properly lie anyhow had the plaintiff first brought it there; no question of appealability arose. Obviously a defendant has no viable objection to a transfer from the wrong to the right jurisdiction under §1406(a) as the statute was interpreted in the *Goldlawr, Inc.* decision. The question was simply one of standing, not appealability.

And the Court of Appeals reliance upon *D'Ippolido v. American Oil Co.*, 2nd Cir., 401 F.2d 764 (1968), for all of its vigorous language, completely overlooks the fact that the transfer was simply a discretionary move based on a finding of lack of convenience that could only be overturned by mandamus for gross abuse of discretion; this presents a railroad track parallel with the cases making distinction between the appealabili-

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[27] 2nd Cir., 218 F.2d 157 (1954).
[28] 369 U.S. 463.
[29] 5th Cir., 380 F.2d 813 (1967).

ty or an order denying intervention as a matter of right and a discretionary order denying permissive intervention.

The difference between a venue shift under section 1404 for lack of convenience and the transfer under section 1406 for purported lack of substantive jurisdiction is midnight and twilight: one presents in this case a black or white point of law; the other, a discretionary gray. (None of the cases cited by the appellate court that a 1406 transfer, under the circumstances of this case, are interlocutory, are in point, we respectfully submit.)

For all the fine points and technicalities, to Stelly's way of thinking, it boils down to this. He can prosecute his case in the court where it was filed as a matter of absolute right. Until inconvenience is shown the right remains absolute. So the order of transfer presents error reviewable someday in someway. Bauer tells him all he has to do is to try his case first where the case was transferred to; appeal; and then try it again where it should be tried in the first place. But is this answer not too pat? Will the rule against fragmentation not thwart the intent of this humanitarian legislation in giving injured workmen the benefit of a choice of forum so long as they do not abuse it? And is this benefit not substantial to the point of being virtually substantive? Bauer has a point about the benefits of finality and the drawbacks of fragmentation. Stelly respectfully submits that Bauer simply seeks to make too much of it.[20]

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[20]See *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541.

Is it not a right of substantial benefit to a dredge hand who signs his name with an X[21] to try his case in a Federal Court twenty miles from home against a corporate employer that covers Dixie like the dew and is covered by an insurer with a nationwide investigative network that will be paid for ultimately by the public whether it is used in this particular case or not. And perhaps Stelly is trying to say here what the Second Circuit said in *McAllister v. Guterma*, 2nd Cir., 129 F.2d 680 (1958):

> "Final" is not a clear one purpose word; it is slithery, tricky. It does not have a meaning constant in all contexts. What was said as to "final" orders a half century ago still holds: "The cases, it must be conceded, are not altogether harmonious.[3] There is still too little finality about "finality".[4] A final decision is not necessarily the ultimate judgment or decree completely closing up a proceeding." But it is not easy to determine what decisions short of that point are final.
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> * * * *
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> [3]*McGourkey v. Toledo & O. Cent. R. Co.*, 1892, 145 U.S. 536, 544, 13 S.Ct. 170, 36 L.Ed. 1079. This was not a case involving "finality" for appeal purposes; yet it has often been cited in such cases. See *Crick*, The Final Judg-

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[21]R. p. 37. (He cannot read a road map.)

ment Rule As A Basis For Appeal, 41 Yale L.J. (1932), 539, 561, 562.

• • • •

[4]See *Crick*, loc.cit. There are several basis of the policy against piecemeal appeals. In part, as *Crick* shows, it has its roots in the accidents of the history of common law procedure. . . . In part, it derives from a desire to prevent congestion in appellate courts. Whether that last purpose has been served is by no means certain; as the question of what is "final" provokes many appellate court decisions, this may be an instance where, as Crick says, a labor-saving device causes more labor than it saves.

The matter is further complicated by the unsettled character of the escapes from the finality doctrine through resorts to the so-called extraordinary remedies.

The issue of finality presents a practical not a technical question. Should this Court find the order not appealable, we respectfully submit the attempted appeal be considered a petition for mandamus in light of patent error, under the rationale set forth by Judge Frank in *U.S. v. Golden*, 2nd Cir. 239 F.2d 877.

I agree that, for the reasons stated in my colleague's opinion, denial of appellant's motion was not appealable as a final decision under 28 U.S.C.A. §1291. I do not, however, wish my participation in this decision to be taken as implying a belief that, in a case of this nature, the appeal should not be treated as a petition for mandamus[1] . . . .

[1]Judge Leonard Hand and I have both protested the view, adopted by this court in civil cases, that the form of the papers is controlling and that when the case comes before us labeled "appeal" we cannot consider it as an application for a prerogative writ. I have felt constrained to follow the precedence laid down by this court in this respect. (Citations.) When doing so, however, I have protested the irrationality involved in the exaltation of labels by this court when at the same time we have rejected antiquated procedural technicalism on the trial court level. (Citations.) Moreover, the Supreme Court has just recently indicated that it will disregard the form in which an appeal is taken or sought to be taken, treating "appeal" papers as petitions for certiorari. *Nunn v. Cal.*, 77 S.Ct. 126 and *Pocatello Building and Construction Trade Counsel* v. *C. H. Elli Construction Company*, 77 S.Ct. 130, both decided November 5, 1956.

CONCLUSION

Under the rule of practicality in determining final decisions the trial court's order in a non-discretionary matter, in a clear case free from doubt, pertaining to matters of right, was final within the meaning of the principals enunciated by this Court. The Court of Appeals laid a new condition upon the rule of finality not intended by this Court: whether or not plaintiff was barred from further prosecution in a court other than in which his suit was initially filed. Because the condition would go into matters dehors, create more uncertainty, less economy and practicality, it is a radical departure from this Court's decisions. Certiorari should be granted to the end that the decision of the Court of Appeals be reviewed and reversed with remand to the end that the case be retransferred to the court where originally filed and the order quashing be vacated or alias process of another type be allowed.

Respectfully submitted,

JAMES DOMENGEAUX
320 West Main Street
Lafayette, Louisiana 70501
Attorney for Petitioner

Of Counsel:
DOMENGEAUX, WRIGHT & BIENVENU
Lafayette, Louisiana

CERTIFICATE OF SERVICE

I, the undersigned member of the Bar of the Supreme Court of the United States, hereby certify that three copies of this Petition for a Writ of Certiorari has been served upon opposing counsel by depositing the same, properly addressed, in the United States Mail, postage prepaid at Lafayette, Louisiana, this ____ day of October, 1970.

JAMES DOMENGEAUX

APPENDIX A

JUDGMENT

The motion to dismiss on behalf of Bauer Dredging Company, Inc. was heard before the Court on June 25, 1969, and the Court, having considered the law and the evidence.

IT IS ORDERED, ADJUDGED AND DECREED that the motion of Bauer Dredging Company, Inc. to quash the summons and service of process upon Ben B. Taylor, Jr. be and the same is hereby granted, and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the above captioned matter be and the same is hereby transferred to the United States District Court, Southern District of Texas, Victoria Division.

The Court is of the opinion that this order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from this order as described by 28 USC Section 1292(b) may materially advance the ultimate termination of this litigation.

Opelousas, Louisiana, this 31st day of July, 1969.

/s/ R. J. Putnam
UNITED STATES
DISTRICT JUDGE

APPROVED AS TO FORM ONLY
/s/ William P. Rutledge
WILLIAM P. RUTLEDGE
Domengeaux, Wright & Bienvenu
Lafayette, Louisiana 70501
Attorney for Plaintiff
Not as to venue change
Nor Requested Relief
/s/ W. P. Rutledge
Filed:
July 31, 1969

APPENDIX B

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 28847

VOORHIES STELLY,
Plaintiff-Appellant,
versus

EMPLOYERS NATIONAL INSURANCE COMPANY
AND BAUER DREDGING COMPANY, INC.,
Defendants-Appellees.

Appeal from the United States District Court for the Western District of Louisiana

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Filed: May 15, 1970

Before JONES, WISDOM, and COLEMAN, Circuit Judges.

BY THE COURT: It appearing that no application for leave to appeal was timely filed within the ten-day period allowed by 28 U.S.C.A., 1292 (b), from the interlocutory order of the District Court of July 31, 1969, and that this Court therefore lacks jurisdiction to consider the appeal,

IT IS ORDERED that the appeal be and the same is hereby dismissed for lack of jurisdiction.

APPENDIX C

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
OFFICE OF THE CLERK

Edward W. Wadsworth
Clerk

Room 408 — 400 Royal St.
New Orleans, La. 70130

June 2, 1970

TO ALL COUNSEL LISTED BELOW

No. 28847 — Voorhies Stelly v Employers National Insurance Co. and Bauer Dredging Co., Inc.

Gentlemen:

The court directs that counsel be present in the courtroom here in New Orleans on Wednesday, June 10, 1970 at 9:30 a.m. at which time they should be prepared to argue the appealability of the order which is the subject of this cause in this court. The court will decide this question from the bench and in the event of a ruling that the order is appealable, the appeal will then be argued on its merits at that time.

Very truly yours,

EDWARD W. WADSWORTH,
Clerk

(Signed) G. F. GANUCHEAU
G. F. Ganucheau
Chief Deputy Clerk

GFG:pc
cc: Mr .William P. Rutledge
Mr. Maurice C. Hebert, Jr.

APPENDIX D

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 28847

VOORHIES STELLY,
Plaintiff-Appellant,
versus

EMPLOYERS NATIONAL INSURANCE COMPANY
and BAUER DREDGING COMPANY, INC.,
Defendants-Appellees.

Appeal from the United States District Court for the
Western District of Louisiana

(August 25, 1970)

Before JONES, WISDOM, and COLEMAN,
Circuit Judges.

ON PETITION FOR REHEARING

PER CURIAM: This appeal by Voorhies Stelly against Bauer Dredging Company was scheduled to be argued on June 10, 1970. On May 15, 1970, however, this Court dismissed the appeal for lack of jurisdiction for the reason "that no application for leave to appeal was timely filed within the ten day period allowed by 28 U.S.C. § 1292(b) from the *interlocutory* order of the District Court of July 31, 1969". (Emphasis added.) *See Borskey v. American Pad & Textile Co.*, 5 Cir. 1961, 296 F.2d 894. The district court had quashed service of process on Bauer Dredging Company and had also transferred the case to the Southern District of Texas under 28 U.S.C. § 1406(a).[1] Stelly petitioned this Court for a rehearing on the ground that the district court's order was a *final* order and that certifica-

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[1] **§1406. Cure or waiver of defects**

(a) The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice transfer such case to any district or division in which it could have been brought.

(b) Nothing in this chapter shall impair the jurisdiction of a district court of any matter involving a party who does not interpose timely and sufficient objection to the venue.

(c) If a case within the exclusive jurisdiction of the Court of Claims is filed in a district court, the district court shall, if it be in the interest of justice, transfer such case to the Court of Claims, where the cases shall proceed as if it had been filed in the Court of Claims on the date it was filed in the district court.

(d) As used in this section, "district court" includes the United States District Court for the District of the Canal Zone; and "district" includes the territorial jurisdiction of that court. As amended May 24, 1949, c. 139, § 81, 63 Stat. 101; Sept. 13, 1960, Pub. L. 86-770, § 1.74 Stat. 912; Oct. 18, 1962, Pub. L. 87-845, § 10, 76A Stat. 699.

tion under Section 1292(b) was surplusage. The appeal was returned to the calendar and the parties were requested to present argument on this question. We hold that the order of the district court was interlocutory and that the appeal was properly dismissed.

I.

An order transferring a case under 28 U.S.C. 1406(a) is interlocutory. An order transferring a case under 28 U.S.C. 1404(a)[2] also is interlocutory. *Crummer Co. v. Du Pont*, 5 Cir. 1952, 196 F.2d 468, cert. denied, 344 U.S. 851, 73 S.Ct. 91, 97 L.Ed. 662; *Pfizer v. Olin Mathieson Chem. Corp.*, 5 Cir. 1955, 225 F.2d 718; *Continental Grain Co. v. Federal Barge Lines, Inc.*, 5 Cir. 1959, 268 F.2d 240, affirmed on other grounds, 364 U.S. 19, 80 S.Ct. 1470, 4 L.Ed.2d 1540; *In re* Humble Oil & Refining Co., 5 Cir. 1962, 306 F.2d 567.

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[2] § 1404. Change of venue

(a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

(b) Upon motion, consent or stipulation of all parties, any action, suit or proceeding of a civil nature or any motion or hearing thereof, may be transferred, in the discretion of the court, from the division in which pending to any other division in the same district. Transfer of proceedings in rem brought by or on behalf of the United States may be transferred under this section without the consent of the United States where all other parties request transfer.

(c) A district court may order any civil action to be tried at any place within the division in which it is pending.

(d) As used in this section, "district court" includes the United States District Court for the District of the Canal Zone; and "district" includes the territorial jurisdiction of that court. As amended Oct. 18, 1962, Pub. L. 87-845, § 9, 76A Stat. 699.

In *Koehring Co. v. Hyde Const. Co.*, 5 Cir. 1963, 324 F.2d 295, we held that a district court could order a change of venue under section 1404(a) notwithstanding the fact that the transferor court did not have personal jurisdiction over the defendant. Our holding rested primarily on the Supreme Court's decision in *Goldwar, Inc. v. Heiman*, 1962, 369 U.S. 463, 82 S.Ct. 913, 8 L.Ed. 2d 39. We concluded that the same considerations of convenience and procedural reform that prompted the enactment of Section 1406(a) applied to Section 1404(a). That conclusion is applicable here. As the Second Circuit stated in *D'Ippolito v. American Oil Co.*, 2 Cir. 1968, 401 F.2d 764:

> It is hard to see how any order could be less "final" than one which merely transfers an action for trial from one district to another in the federal judicial system, whether the transferee district is in the same circuit or a different one.

II.

Stelly's argument that the district court's order quashing service of process is a final adjudication of the rights and liabilities of the parties relies upon the Supreme Court's holding in *Rosenberg Bros. v. Curtis Brown Co.*, 1923, 260 U.S. 516, 43 S.Ct. 170, 67 L.Ed. 372. In *Rosenberg* a New York corporation brought suit against an Oklahoma corporation in the New York state court. Service of process was by delivery of a summons to the defendant's president while he was temporarily in New York. The case was removed to

the federal court when the defendant moved to quash the summons on the ground that it was not amenable to process at the time of service. The district court granted the defendant's motion. On appeal, the Supreme Court held:

> The order entered below, although in form an order to quash the summons, and not a dismissal of the suit, is a final judgment; and the case is properly here.

260 U.S. at 517, 67 L.Ed. at 375. The Court viewed the order as effectively terminating the litigation so that there could never be any recovery against the defendant if the order were to stand. See *Moss v. Kansas City Life Ins. Co.*, 8 Cir. 1938, 96 F.2d 108. In *In re Melekov*, 9 Cir. 1940, 114 F.2d 727, the court held that a writ of mandamus could not be used to order the district court to vacate an order quashing and setting aside service of process on all of the defendants. The court, relying upon *Rosenberg*, held that the order was *in effect* a final judgment and was appealable through an appeal or a writ of error.

This Court in *Carmack v. Panama Coca-Cola Bottling Co.*, 5 Cir. 1951, 190 F.2d 382, held that the district court's order quashing summons was a final decree from which an appeal could be taken. The potential injustice to the plaintiff if he was not permitted to appeal the district court's order was the primary concern in both *Carmack* and *Melekov*. In neither case did the court wish to expose the plaintiff to the necessity of having to re-file his lawsuit and risk the danger

of having his suit barred by the applicable statute of limitations. In *Carmack* we said:

> We think it is clear that the order quashing the summons is so far final as to prevent the further prosecution of suit and that consequently the order is appealable. (citing *Rosenberg*).

190 F.2d at 384.

The danger and potential injustice that were present in *Rosenberg, Melekov,* and *Carmack* are not present here. In those cases it was apparent that if the orders quashing summons were to stand, the rulings would in effect have precluded the individual plaintiffs from their day in court. That is not this case. The district court's order clearly guards against any danger or potential injustice to Stelly. Stelly does not have to re-file his lawsuit, nor does he risk having his suit barred by the applicable statute of limitations. Stelly is still in the federal court although in a different room. The district court's order rather than having the effect of precluding Stelly from further prosecuting his lawsuit, guarantees that Stelly will have his day in court.

We hold that the district court's order is not final. See *Bjorgo v. Weerden,* 7 Cir. 1965, 342 F.2d 558.

The petition for rehearing is DENIED.

APPENDIX E

IN THE
UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
OPELOUSAS DIVISION

Filed: Oct. 30, 1969

VOORHIES STELLY

vs. Civil Action No. 14131

EMPLOYERS NATIONAL INSURANCE COMPANY
AND BAUER DREDGING CO., INC.

MINUTE ORDER

The Court has no further jurisdiction. Therefore, the Court declines to act upon Plaintiff's motion for new trial wth respect to Bauer's Motion to Dismiss.

Opelousas, Louisiana, October 30, 1969.

BY DIRECTION OF THE COURT
ALTON L. CURTIS, CLERK
(Signed) JANELLA PITRE
Deputy Clerk

APPENDIX F

No. 14,141

MOTION TO DISMISS AND/OR TO QUASH RETURN OF SERVICE OF SUMMONS ON BEHALF OF BAUER DREDGING CO., INC.

COMES NOW, Bauer Dredging Co., Inc., defendant, appearing solely for the purpose of this motion and without admitting the jurisdiction of the Court, and moves to dismiss this action on its behalf on the ground that service of process on its agent, Ben B. Taylor, Jr., is improper and accordingly there is no jurisdiction in the United States District Court for the Western District of Louisiana, Lafayette Division. In support of this motion, defendant annexes hereto and makes part hereof the affidavits of W. F. Tanner dated November 21, 1968.

New Orleans, Louisiana, November 27, 1968.

/s/ Maurice C. Hebert, Jr.
MAURICE C. HEBERT, JR.

Filed
November 29, 1968

AFFIDAVIT

BEFORE ME, the undersigned authority, on this date personally appeared W. F. TANNER, who upon his oath, deposed and stated as follows:

"My name is W. F. Tanner and I am Vice-President-Assistant Secretary of Bauer Dredging Co., Inc. which is a Texas corporation. The principal office and place of business of Bauer Dredging Co., Inc. is Port LaVaca, Texas. Bauer Dredging Co., Inc. is licensed to and is doing business within the State of Louisiana and its agent for service of process is Ben B. Taylor, Jr., Louisiana National Bank Building, Baton Rouge, Louisiana. Bauer Dredging Co., Inc. is in the business of marine contracting, primarily dredging. Bauer Dredging Co., Inc. entered into a contractual agreement with the Corps of Engineers, Little Rock District, State of Arkansas for dredging operations in White River, Arkansas. The contract is designated as DA-03-050-CIV ENG-65-80 and was signed in Port LaVaca, Texas by J. C. M. Cryer, Vice President of Bauer Dredging Co., Inc. The dredging operations with Dredge #32 began in White River, Arkansas on July 15, 1965 and were terminated on June 27, 1966. Additional work was done in White River, Arkansas from October 28, 1966 to February 7, 1967. The dredging operations in White River, Arkansas had no relationship whatsoever with any dredging activities Bauer Dredging Co., Inc. had or may have had at that time within the State of Louisiana. Voorhies Stelly was hired by Bauer Dredging Co., Inc. on or about November 2, 1965 to work aboard Dredge #32 which was then working in White River, Arkansas. Subsequent to plaintiff's employment on or

about November 2, 1965 and up to the date of his alleged injury, he performed no work for Bauer Dredging Co., Inc. within the State of Louisiana nor was he engaged in any activities outside of the State of Louisiana which was a result of any business activity carried on by Bauer Dredging Co., Inc. within the State of Louisiana."

/s/ W. F. Tanner
W. F. TANNER, Vice President-Assistant Secretary
Bauer Dredging Co., Inc.

SWORN TO AND SUBSCRIBED before me this 21st day of November, 1968.

/s/ Mary Virginia Parker
NOTARY PUBLIC in and for Calhoun County, Texas

My Commission expires June 1, 1969

AFFIDAVIT

STATE OF TEXAS
COUNTY OF CALHOUN

BEFORE ME, the undersigned authority, personally came and appeared W. F. TANNER, who being by me first duly sworn, did depose and say:

That he is Vice President-Assistant Secretary of Bauer Dredging Co., Inc.; that he has examined the

records of this company; that in the month of May, 1966, the month Voorhies Stelly alleges to have been injured aboard Dredge #32, said Dredge #32 was located in White River, Arkansas or within the State of Arkansas.

/s/ W. F. Tanner
W. F. TANNER, Vice President-Assistant Secretary
Bauer Dredging Co., Inc.

Sworn to and subscribed to before me this 21st day of November, 1968.

/s/ Mary Virginia Parker
NOTARY PUBLIC
Mary Virginia Parker

My Commission expires June 1, 1969